No. 16-1140

IN THE

Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, *et al.*,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR *AMICI CURIAE* CALIFORNIA WOMEN'S LAW CENTER, GENDER JUSTICE, LEGAL VOICE, AND SOUTHWEST WOMEN'S LAW CENTER IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the disclosures required by California's Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act ("FACT Act") violate the protections set forth in the Free Speech Clause of the First Amendment, which is applicable to the states through the Fourteenth Amendment.

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INTEREST OF *AMICI CURIAE*[1]

Amicus Curiae **California Women's Law Center** ("CWLC") is a statewide nonprofit law and policy center dedicated to breaking down barriers and advancing the potential of women and girls through impact litigation, advocacy and education. A vital part of CWLC's mission is fighting for reproductive health, rights, and justice by ensuring women have access to the health care opportunities they need to lead healthy and productive lives. CWLC believes that women and adolescent girls deserve the right to make choices about their bodies and it is vital to ensure that the full range of reproductive health options are accessible to all women and adolescent girls regardless of their income levels or residence.

CWLC has a direct interest in this case because of the prevalence of pregnancy centers and rates of unintended pregnancies in California. In 2010, forty-eight percent of all pregnancies (393,000) in California were unintended.[2] As of 2015, at least 228 pregnancy centers existed in

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[1] All parties have consented to the filing of this brief. Pursuant to this Court's Rule 37.6, *Amici* state that no counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

[2] GUTTMACHER INSTITUTE, *State Facts About Unintended Pregnancy: California* (Aug. 2017), https://www.guttmacher.org/fact-sheet/state-facts-about-unintended-pregnancy-california (last visited Feb. 23, 2018).

California.[3] CWLC therefore has an interest in the enforcement of the FACT Act ensuring that women in California are informed of the public programs available to them when they are faced with an unplanned pregnancy or seek contraception services.

Amicus Curiae **Gender Justice** is a nonprofit organization in Minnesota that acts to eliminate gender barriers—whether linked to sex, sexual orientation, gender identity, or gender expression—through impact litigation, policy advocacy, and education. The organization takes a three-pronged approach to advocacy, combining the most current science on the root causes of discrimination, strategic court cases, and lasting public policy change. Gender Justice works toward reproductive rights, autonomy, and freedom for all. Gender Justice believes all women deserve accurate information about their pregnancies, like those who are protected by California's FACT Act. The organization is particularly vested in the outcome of this case. In Minnesota, ninety pregnancy centers purport to help women with unplanned pregnancies.[4]

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[3] UC HASTINGS COLLEGE OF LAW, PUBLIC LAW RESEARCH INSTITUTE, *Pregnancy Resource Centers: Ensuring Access and Accuracy of Information 2011* (citations reviewed and updated June 1, 2015) (citing RAMAH INTERNATIONAL, *CA-California Pregnancy Resource Centers*, https://www.helpinyourarea.com/california/ (last visited Feb. 23, 2018) (formerly http://ramahinternational.org/california.html)).

[4] HELP IN YOUR AREA: PREGNANCY RESOURCE CENTER DIRECTORY, *Minnesota – MN Pregnancy Resource Centers*,

Amicus Curiae **Legal Voice**, formerly known as the Northwest Women's Law Center, is a regional nonprofit public interest organization based in Seattle that works to advance women's and LGBTQ legal rights in the five Northwest states (Washington, Oregon, Idaho, Montana, and Alaska) through public impact litigation, legislation, and legal rights education. Since its founding in 1978, Legal Voice has been dedicated to protecting and expanding access to reproductive health care, and has long focused on the threats to access to reproductive health care posed by the deceptive practices of pregnancy centers. Legal Voice has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country to help ensure all people's rights to health care access, self-determination, and bodily autonomy. Notably, in 2010, forty-eight percent of all pregnancies (61,000) in Washington State were unintended.[5]

In 2010, Legal Voice and Planned Parenthood Votes Washington published the results of a two-year investigation into Washington State crisis pregnancy centers, available at http://www.nwwlc.org/focus/health/documents/LimitedServicePregnancyCentersReport1.2011.pdf. Based on its

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https://www.helpinyourarea.com/minnesota/ (last visited Feb. 23, 2018).

[5] GUTTMACHER INSTITUTE, *State Facts About Unintended Pregnancy: Washington* (Aug. 2017), https://www.guttmacher.org/fact-sheet/state-facts-about-unintended-pregnancy-washington (last visited Feb. 23, 2018).

investigation, Legal Voice determined that these entities undermine compelling city and state interests in regulating health care and protecting consumers. In 2017, Legal Voice testified before the Seattle-King County Board of Health in support of a proposed ordinance requiring crisis pregnancy centers to state clearly and publicly, in ten languages, that they are not health care providers, much like the FACT Act at issue in this case. As of February 2018, there are approximately fifty-five crisis pregnancy centers in Washington State.[6]

Amicus Curiae **Southwest Women's Law Center** is a nonprofit policy and advocacy law center that was founded in 2005 with a focus on advancing economic opportunities and protecting access to reproductive health for women and girls in the state of New Mexico. The Law Center works to ensure that women have access to quality, affordable healthcare, including access to contraceptives and abortion services. Through its policy and advocacy work, the Law Center helps to ensure that women have access to a full range of information regarding reproductive healthcare to make informed decisions about the healthcare services they choose. New Mexico has the highest rate of adolescent pregnancy in the entire country. And, over half of the

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[6] HELP IN YOUR AREA: PREGNANCY RESOURCE CENTER DIRECTORY, *Washington – WA Pregnancy Resource Centers*, https://www.helpinyourarea.com/washington/ (last visited Feb. 23, 2018).

pregnancies in the state are unintended.[7] Accordingly, the Southwest Women's Law Center is uniquely qualified to present argument concerning *National Institute of Family & Life Advocates, dba NIFLA v. Becerra*, particularly as it relates to the purposes and state interest in enacting the California FACT Act.

SUMMARY OF ARGUMENT

Seeking to "ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them,"[8] California adopted the Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act ("the FACT Act" or "the Act") in 2015. Petitioners now challenge the Act.

The FACT Act is very straightforward. It requires (a) pregnancy care centers that are licensed medical providers to post a notice that the State has public programs that can provide, at no or low cost,

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[7] Kathryn Kost et al., GUTTMACHER INSTITUTE, *Pregnancies, Births and Abortions Among Adolescents and Young Women in the United States, 2013: National and State Trends by Age, Race and Ethnicity* (Sept. 2017), https://www.guttmacher.org/report/us-adolescent-pregnancy-trends-2013 (last visited Feb. 23, 2018); GUTTMACHER INSTITUTE, *State Facts About Unintended Pregnancy: New Mexico* (Aug. 2017), https://www.guttmacher.org/fact-sheet/state-facts-about-unintended-pregnancy-new-mexico (last visited Feb. 23, 2018).

[8] Assem. Bill 775, § 2, California FACT Act, 2015–2016 Reg. Sess. (Cal. 2015).

comprehensive family planning services including all FDA-approved methods of contraception, prenatal care, and abortion and (b) pregnancy centers that are not licensed as medical facilities to disclose that fact.

Amici submit this brief to counter Petitioners' assertion that the State of California does not have sufficient interest in protecting a woman's right to be informed that California has public programs that provide immediate and free or low cost comprehensive family planning services or to be informed that the facility she has entered is not a licensed medical provider to require the challenged notices.

California adopted the FACT Act knowing that low income women—those most likely to respond to pregnancy centers' offers of free services and most in need of information about the full range of free or low cost options available to them—are significantly more likely to have an unintended pregnancy than more affluent women. Significant, too, in relation to where pregnancy centers are located and how they are marketed, women of color, who are more likely than white women to be low-income, are more than twice as likely to experience an unintended pregnancy. Further, while it is estimated that just under half of all pregnancies in California are unintended, that percentage is closer to seventy-five percent for pregnant adolescents between the ages of fifteen and nineteen.

When it enacted the FACT Act, California also recognized that at the time they believe they may be pregnant, many women and adolescent girls are not

aware of the full range of low cost or free options available to them, including options for avoiding unintended pregnancies in the future. California also understood that pregnancy decisions are time sensitive and that it therefore was imperative to ensure that women and adolescent girls who believed they were pregnant and sought pregnancy-related services would be able to obtain information they required to make an informed decision about their situations as expeditiously as possible.

There is no violation of the First Amendment in California's law requiring that pregnancy care providers that do not offer abortions and do not provide information on all FDA-approved forms of contraception post a notice stating that there are public programs that do offer those alternatives at no or low cost and requiring unlicensed pregnancy centers that meet certain express criteria relating to the health and pregnancy services that they do provide to inform those seeking their services that they are not licensed medical facilities.

ARGUMENT

I. CALIFORNIA HAS AN INTEREST THAT IS SUFFICIENT TO WITHSTAND ANY LEVEL OF SCRUTINY IN ENSURING THAT WOMEN WHO HAVE UNPLANNED PREGNANCIES KNOW THAT THE STATE HAS PROGRAMS TO PROVIDE FREE OR LOW COST COMPREHENSIVE FAMILY PLANNING SERVICES TO THEM

A. Pregnancy Centers Target People Who Are Most in Need of Truthful Information about Where to Access Low Cost or Free Reproductive Health Care

California's Reproductive Privacy Act provides that every individual has the fundamental right to choose to bear a child or to choose to obtain an abortion prior to the viability of the fetus and that every individual has the fundamental right to choose or refuse birth control.[9] Because the people of California have determined that they should have access to the means to exercise these fundamental rights regardless of ability to pay, California provides state-funded health insurance coverage of both abortion and contraception.[10] And to

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[9] Sen. Bill 1301, Reproductive Privacy Act, 2001-2002 Reg. Sess. (Cal. 2002) (codified at CAL. HEALTH & SAFETY CODE § 123462 (a) and (b)).

[10] *Id.; see also* NATIONAL HEALTH LAW PROGRAM, *California Abortion Coverage in Medi-Cal and Private Insurance*, http://accesswhj.org/sites/default/files/docs/NHeLP-CAAbortionCoverageFactSheet-Web.pdf; CAL. DEP'T OF HEALTH

ensure that the people of the state know of these programs and how to access them, California enacted the FACT Act. The express purpose of the Act is to "ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them."[11]

Petitioner pregnancy centers do not include abortion among the options that they offer women who have unplanned pregnancies and they do not dispense "contraceptives, abortifacients, and IUDs."[12] They contest the provisions of the FACT Act that require pregnancy centers that are licensed primary care facilities to post a notice informing their clients that California has public programs that do provide free or low cost access to comprehensive family planning services, including all FDA-approved methods of contraception and abortion, and that require centers that provide pregnancy-related services but are not licensed by the state and do not have a licensed medical officer on staff to so inform their clients.

CARE SRVS., *Medi-Cal Provider Manual Ch. Abortions*, at 1; CAL. DEP'T OF HEALTH CARE SRVS., *Medi Cal Provider Manual Ch. Family Planning*, at 2, 7–12; CAL. HEALTH & SAFETY CODE § 1367.25.

[11] Assem. Bill 775, § 2, California FACT Act, 2015–2016 Reg. Sess. (Cal. 2015).

[12] Brief for Petitioners ("Pet. Br.") at 14, *Nat'l Inst. of Family & Life Advocates v. Becerra* (2018) (No. 16-1140).

These notices are of particular importance because both licensed and unlicensed pregnancy centers target pregnant women and adolescents most in need of information about the full range of publicly funded options available to them.

The NARAL Pro-Choice California Foundation ("NARAL") undertook an investigation of pregnancy centers in California in 2010, visiting fourteen and contacting eighteen others, and then issued a report on its findings.[13] Petitioners dismiss NARAL as "partisan"[14] but fail to challenge the substance of its findings. These include that pregnancy centers "increasingly target groups that are the most underserved by the current health-care system...These groups include women of color, young women, women living in rural locations, and low-income women."[15] [16]

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[13] NARAL PRO-CHOICE CALIFORNIA FOUNDATION, *Unmasking Fake Clinics: The Truth About Crisis Pregnancy Centers in California* (2010), at 13, https://www.sfcityattorney.org/wp-content/uploads/2015/08/Unmasking-Fake-Clinics-The-Truth-About-Crisis-Pregnancy-Centers-in-California-.pdf [hereinafter "NARAL REPORT"].

[14] Pet. Br. at 52, n.17.

[15] NARAL REPORT at 6.

[16] *Amici* show below that these groups also experience relatively high rates of unintended pregnancies. *Amici* located outside California have observed, documented, and sought to correct the same activities by pregnancy centers in their states that NARAL reported on in California because they have had the same negative impact on access to reproductive health care that is described in the text with respect to California.

Amici compared the list of 228 pregnancy centers in California with 2010 census data and determined that almost twenty-eight percent of the pregnancy centers in California are located in what the United States Census defines as a rural community (that is, an area outside an Urban Area which is itself defined as having 50,000 or more inhabitants). These centers also are located in areas in which the median household income is below the national average.[17] The NARAL California Report found that ninety-three percent of the counties in California, many of which are rural, have one or more pregnancy centers.[18]

Citing to information that was then posted on the website of Care Net, an association of approximately 1100 pregnancy centers, including centers in California,[19] NARAL reported that the network had created an initiative to increase the number of African American women who came to its centers by constructing new

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[17] *Compare* UC HASTINGS COLLEGE OF LAW, PUBLIC LAW RESEARCH INSTITUTE, *Pregnancy Resource Centers: Ensuring Access and Accuracy of Information 2011* (citations reviewed and updated June 1, 2015) *with* CALIFORNIA PROLIFE COUNCIL, *List of Crisis Pregnancy Centers*, https://www.californiaprolife.org/crisis-pregnancy-centers/ (last visited Feb. 23, 2018). *Amici* then collected the relevant data from the United States Census Bureau for the cities in California where crisis pregnancy centers are located.

[18] NARAL REPORT at 6.

[19] For example, Care Net of Northern California in Redding, California, as well as Care Net designated facilities in Santa Maria, Lancaster, Lompoc, Paradise, and Red Bluff, California.

locations in neighborhoods with large populations of African Americans, affiliating with local institutions such as churches in those neighborhoods, and buying advertisements on outlets like Black Entertainment Television that compared abortion to slavery.[20] NARAL also reported that Care Net advertised in bus shelters to attract women who might be homeless or low-income.[21]

Further, NARAL found that some pregnancy centers had opened near comprehensive women's health clinics with the expectation that unsuspecting people seeking pregnancy-related services might enter the centers in the mistaken belief that they were entering the comprehensive women's health clinic. Of the fourteen California pregnancy centers that NARAL reported visiting, two were located within one hundred yards of a Planned Parenthood clinic.[22]

In a separate report, the National Abortion Federation found that pregnancy centers targeted young people by offering free pregnancy tests, advertising in school newspapers, and opening in close proximity to colleges and universities.[23]

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[20] NARAL REPORT at 6, nn. 45–46.

[21] *Id.*

[22] *Id.*

[23] NATIONAL ABORTION FEDERATION, *Crisis Pregnancy Centers: An Affront to Choice*, at 5 https://www.prochoice.org/pubs_research/publications/downloads/public_policy/cpc_report.pdf (2006).

The people targeted by pregnancy centers also are those who experience relatively high rates of unplanned pregnancy and, because they are most likely to lack private insurance coverage for reproductive care, are most in need of information disclosing that all FDA-approved methods of contraception, including abortion, are available through public programs in California for free or at low cost.

B. The Groups Targeted by Pregnancy Centers Are Those Who Most Need to Be Informed that Public Programs in California Provide Free or Low Cost Comprehensive Family Planning Services

By virtue of the size and relatively young age of its population, California accounts for one in eight of all births in the United States. Over half a million babies were born in California in 2014, and having a baby was the number one reason for hospital admissions in the state.[24] The State therefore has great interest in and concern for the medical services and options available to its pregnant population.

Further, when California adopted the FACT Act in 2015, it was well known that almost one-half of the pregnancies in California were unplanned,[25] and that

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[24] Jen Joynt, CALIFORNIA HEALTH CARE FOUNDATION, *Maternity Care in California: Delivering the Data*, CALIFORNIA HEALTH CARE FOUNDATION (June 28, 2016), http://www.chcf.org/publications/2016/06/maternity-care-california (last visited Feb. 23, 2018).

[25] *Id.*

"[u]nintended pregnancy can have significant, negative consequences for individual women [and] their families...An extensive body of research links births resulting from unintended or closely spaced pregnancies to adverse maternal and child health outcomes and myriad social and economic challenges."[26]

Moreover, when California adopted the FACT Act it also was well known that the groups being targeted by pregnancy centers were those with the highest incidence of unplanned pregnancies. For example, "[l]ow-income women [were] more likely than more affluent women to have an unintended pregnancy. The unintended pregnancy rate among women with an income below the federal poverty level ($18,530 for a family of three in 2011) was more than five times that among women with an income at or above 200% of poverty in 2011."[27] And, "[w]omen of color are also much more likely than white women to experience unintended pregnancy. In 2011, black and Hispanic women had an unintended pregnancy rate of seventy-nine and fifty-eight per 1,000 women,

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[26] As reported by the Guttmacher Institute, in 2010, forty-eight percent of all pregnancies (393,000) in California were unintended. GUTTMACHER INSTITUTE, *State Facts About Unintended Pregnancy: California* (Aug. 2017), https://www.guttmacher.org/fact-sheet/state-facts-about-unintended-pregnancy-california (last visited Feb. 23, 2018) (citing studies).

[27] Lawrence B. Finer & Mia R. Zolna, *Declines in Unintended Pregnancy in the United States, 2008-2011*, 374 NEW ENG. J. OF MED. 843–52 (March 3, 2016), http://www.nejm.org/doi/full/10.1056/NEJMsa1506575.

respectively, compared with thirty-three per 1,000 among white women."[28]

Additionally, there is a high rate of unintended pregnancy among adolescent girls: "The majority (75%) of adolescent pregnancies in the United States are unintended,"[29] and there is no reason to believe the percentage in California is materially different.[30]

The Kaiser Family Foundation reports that the pregnancy rates for African American, Hispanic, and Native American adolescent girls are over twice the rates for White and Asian American adolescent girls, and that adolescent pregnancy rates are higher in rural than in suburban and urban areas.[31] Additional studies

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[28] GUTTMACHER INSTITUTE, *Medicaid Funding of Abortion* (Dec. 2016), https://www.guttmacher.org/evidence-you-can-use/medicaid-funding-abortion (last visited Feb. 23, 2018).

[29] GUTTMACHER INSTITUTE, *State Facts About Unintended Pregnancy: California* (Aug. 2017), https://www.guttmacher.org/fact-sheet/state-facts-about-unintended-pregnancy-california (last visited Feb. 23, 2018).

[30] The earlier findings of the Kaiser Family Foundation are to the same effect: "The overwhelming majority-78 percent-of pregnancies to 15-19 year old teen girls are not planned. Among younger teens, 15-17 year olds, 83 percent of pregnancies are unplanned." KAISER FAMILY FOUNDATION, *Teen Pregnancy: Key Statistics* (Jan. 31, 1998), https://www.kff.org/hivaids/teen-pregnancy-key-statistics/ (last visited Feb. 23, 2018). "More than four in 10 young women become pregnant at least once before they reach the age of 20 – nearly one million a year." *Id.*

[31] KAISER FAMILY FOUNDATION, *Sexual Health of Adolescents and Young Adults in the United States* (Aug. 20, 2014),

of pregnancies among African American adolescent girls have found that fifty-one percent of African-American girls will become pregnant at least once before they turn twenty. In comparison, nineteen percent of non-Latina white adolescent girls will become pregnant before that same age.[32]

C. Women and Adolescent Girls Experiencing Unplanned Pregnancies Require Timely Information About the Availability of Abortion Services

The decision about whether to have an abortion is time sensitive. Abortions cannot legally be performed in California once the fetus is viable. Further, the medical risks, while not great, increase with the length of the pregnancy.[33]

i. Delayed Recognition of Pregnancy

Receiving timely information about the availability of free or low cost comprehensive family planning services,

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https://www.kff.org/womens-health-policy/fact-sheet/sexual-health-of-adolescents-and-young-adults-in-the-united-states/ (last visited Feb. 23, 2018).

[32] NATIONAL CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, *Policy Brief: Racial and Ethnic Disparities in Teen Pregnancy* (June 2010), http://www.amchp.org/AboutAMCHP/Newsletters/Pulse/Archive/2011/May2011/Pages/Resources.aspx.

[33] *See, e.g.*, Linda Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 OBSTETRICS & GYNECOLOGY 729–37 (April 2004).

including abortion, is particularly important for those experiencing their first pregnancy and for young women because delay in recognition of pregnancy is associated with young age and a first pregnancy.[34] [35]

ii. Pregnancies Resulting from Rape or Coercion

Receiving timely information—and the opportunity to act on it—is also of enormous importance to women and adolescent girls who have been raped[36] or become

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[34] *See, e.g.*, Diana Greene Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108 AM. J. OF PUBLIC HEALTH 407–13 (March 1, 2018), http://ajph.aphapublications.org/doi/10.2105/AJPH.2017.304247, and studies cited therein, at 6, nn. 18–20.

[35] The importance of timely information about all options including abortion is underscored by the additional health risks present when an adolescent as compared to an adult woman is pregnant. "Among adolescents, low birth rate and preterm deliveries are more than twice as common as in adult pregnancies and the neonatal mortality rate is almost 3 times higher...Pregnant adolescents under the age of 15 years also are at higher risk for maternal complications than are adult mothers. Some of the most common problems are abnormally high maternal weight gains, pregnancy-induced hypertension, anemia, and renal disease." Janet C. King, *The Risk of Maternal Nutritional Depletion and Poor Outcomes Increases in Early or Closely Spaced Pregnancies*, 133 THE JOURNAL OF NUTRITION 1732S–1736S (May 2003).

[36] According to the California Attorney General, there were 13,695 instances of rape reported to law enforcement authorities in the state in 2016. ATTORNEY GENERAL, CALIFORNIA DEPARTMENT OF JUSTICE, *Crime in California*, at 5 (2016),

pregnant as a consequence of intimate partner violence. As this Court recognized in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, intimate partner violence is all too common in the United States: "[I]n an average 12-month period in this country, approximately two million women are the victims of severe assaults by their male partners."[37] Approximately one in four women who have been raped by their intimate partners becomes pregnant.[38] In addition, many men in violent relationships exercise what has become known as reproductive or pregnancy coercion, refusing to use condoms and sabotaging their partners' efforts to use birth control.[39]

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https://openjustice.doj.ca.gov/resources/publications. This number greatly understates the number of rapes actually committed because rape is notoriously under-reported. *See, e.g.*, CALLIE MARIE RENNISON, U. S. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS, *Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000*, at 2 (Aug. 2002), https://www.bjs.gov/content/pub/pdf/rsarp00.pdf (noting that only thirty-six percent of victims of completed rapes reported these crimes to the police).

[37] 505 U.S. 833, 891 (1992).

[38] Judith McFarlene, *Pregnancy Following Partner Rape: What We Know and What We Need to Know*, 8 TRAUMA, VIOLENCE, & ABUSE 127, 128 (2007).

[39] *See, e.g.*, Elizabeth Miller et al, *Pregnancy Coercion, Intimate Partner Violence, and Unintended Pregnancy*, 81 CONTRACEPTION 316 (2010); Anne M. Moore et al., *Male Reproductive Control of Women Who Have Experienced Intimate Partner Violence in the United States*, 70 SOC. SCI. & MED. 1737 (2010).

The unintended pregnancies of adolescent girls correlate highly with abuse and reproductive coercion.[40] Reproductive coercion involving adolescents may include rape, coerced sex, and pressure to get pregnant as a means of proving loyalty to the abusive partner.[41]

Research has found that almost fifty percent of women who become pregnant as a result of rape obtain abortions. [42] Women and adolescent girls who experience forced pregnancies therefore have a particular need for timely information about the availability of abortion and how to access providers who will perform an abortion.

iii. Lack of the Means to Support a Child

"When women are asked why they want to end a pregnancy, the most common reasons are financial—in particular not having enough money to raise a child or support another child."[43] Consistent with that finding, in

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[40] Elizabeth Miller et al., *Male Partner Pregnancy – Promoting Behaviors and Adolescent Partner Violence: Findings from a Qualitative Study with Adolescent Females*, 7 AMBULATORY PEDIATRICS 360, 364–65 (2007).

[41] *Id.* at 363–64; Anne M. Moore et al., *Male Reproductive Control of Women Who Have Experienced Intimate Partner Violence in the United States*, 70 SOC. SCI. & MED. 1740 (2010).

[42] Melissa M. Holmes et al., *Rape-Related Pregnancy: Estimates and Descriptive Characteristics from a National Sample of Women*, 175 AM. J. OBSTETRICS & GYNECOLOGY 320, 322 (1966).

[43] Janet C. King, *The Risk of Maternal Nutritional Depletion and Poor Outcomes Increases in Early or Closely Spaced Pregnancies*, 133 THE JOURNAL OF NUTRITION 1732S–1736S (May, 2003).

2014, seventy-five percent of abortions were among poor and low-income women; forty-nine percent of those women had a family income less than 100 percent of the federal poverty level.[44] [45] It therefore is essential that low income women visiting pregnancy centers receive timely information about their reproductive health care options so that they can reach an informed decision about whether to seek an abortion.

A recently completed five-year longitudinal study comparing the lives of otherwise similarly situated women who carried an unwanted pregnancy to term and those who had an abortion found "a close link between obtaining abortion care and subsequent poverty."[46] The "majority of women in the study were living in poverty at baseline, and carrying the unwanted pregnancy to term led to almost a 4-fold increase in the odds that a woman's household income was below the FPL [federal poverty level]. [Failure to obtain a desired abortion] may result

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[44] As a point of reference, according to the United States Census, 15.4% of the total population and 16.4% of the California population had incomes below the poverty level in 2014. LEGISLATIVE ANALYST'S OFFICE, *Census Bureau's Updated Poverty Statistics* (Sept. 24, 2015), http://www.lao.ca.gov/LAOEconTax/Article/Detail/136.

[45] GUTTMACHER INSTITUTE, *Medicaid Funding of Abortion* (Dec. 2016), https://www.guttmacher.org/evidence-you-can-use/medicaid-funding-abortion (last visited Feb. 23, 2018).

[46] Janet C. King, *The Risk of Maternal Nutritional Depletion and Poor Outcomes Increases in Early or Closely Spaced Pregnancies*, 133 THE JOURNAL OF NUTRITION 1732S–1736S (May 2003).

in reductions in full-time employment, increased incidence of poverty, more women raising children alone, and greater reliance on public assistance."[47]

iv. The FACT Act Ensures Timely, Complete Information

Recognizing that pregnancy-related decisions are time sensitive, in adopting the FACT Act, California sought to ensure that a woman or adolescent girl who knew or feared she was experiencing an unplanned pregnancy and visited a pregnancy center was given the opportunity to learn about all of her low or no cost options, including abortion.

In *Whole Woman's Health*, this Court considered the constitutionality of provisions of a Texas law requiring that (1) a physician performing an abortion must have active admitting privileges at a hospital not more than thirty miles away and (2) that an abortion facility must have the same minimum standards as a surgical facility.[48] After determining that neither provision conferred medical benefits sufficient to justify the substantial burden these obstacles placed on the right to abortion access, this Court struck down both provisions.[49] Here, California's FACT Act sought to address and mitigate the substantial obstacles pregnancy centers were

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[47] *Id.*

[48] *Whole Woman's Health v. Hellerstedt*, 579 U.S. ___, 136 S. Ct. 2300 (2016) (citing *Casey*, 505 U.S. at 878).

[49] *Id.*

creating that resulted in an undue burden on access to reproductive health services, including abortion.[50]

For these reasons, California has an interest that survives any level of First Amendment scrutiny in requiring that women and adolescent girls in California who are experiencing unplanned pregnancies and are visiting pregnancy centers that do not offer abortions be given notice regarding the availability in California of public programs that provide comprehensive family planning services, including abortion, at low cost or for free.

II. CALIFORNIA HAS AN INTEREST IN ENSURING THAT WOMEN AND ADOLESCENT GIRLS VISITING PREGNANCY CENTERS LEARN THAT CALIFORNIA PROVIDES IMMEDIATE ACCESS TO ALL FDA-APPROVED METHODS OF CONTRACEPTION AT NO OR LOW COST

Petitioners label the disclosure required of licensed pregnancy centers as the "Compelled Abortion Referral"[51] and direct their argument to their objection

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[50] *See* Assem. Bill 775, § 1a, California FACT Act, 2015-2016 Reg. Sess. (Cal. 2015) ("All California women, regardless of income, should have ***access to reproductive health services***.") (emphasis added); *id.* at § 2 ("The purpose of this act is to ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them.")

[51] It bears repeating that the challenged disclosure is not a "referral." It is a notice stating that California has programs that provide family planning services, including abortion, and that if a

to providing notice that California provides opportunities to obtain low or no cost abortions. In doing so, they all but ignore the portion of the challenged notice that states that California has public programs that provide free or low cost access to all FDA-approved methods of contraception. Yet, California has an independent interest in ensuring that information relating to access to contraception is provided to all people who visit pregnancy centers.

Such information—and access to effective, safe contraception—is essential if the number of unplanned pregnancies is to be reduced, particularly for adolescent girls and for women and girls who are seeking to avoid additional pregnancies when their health or financial pressures cause them to conclude that they should not add additional children to their households.

A. The Importance of Contraception

Amici referenced above in footnote thirty-five the particular health risks of pregnancy to adolescents that support California's interest in ensuring that adolescents who seek the services of a pregnancy center are provided the opportunity to learn of all the methods of contraception that are available to them at free or no cost in California. There also are significant health risks to women of all ages that are associated with closely spaced pregnancies that further support California's interest in requiring that pregnancy centers provide

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woman is interested in learning if she qualifies for those services, she may contact the local social services office.

notice that the state has public programs to provide all FDA-approved methods of contraception at low cost or for free.

In the United States, women with interpregnancy intervals of under eight months are fourteen to forty-seven percent more likely to have very premature to moderately premature infants than are women with intervals of eighteen to fifty-nine months.[52] And, notwithstanding advancements in neonatal health techniques, more than 15,000 babies in the United States die each year within one month of birth —with one-quarter or more of these deaths directly related to premature birth.[53] Citing academic studies, the Mayo Clinic identifies the following risks in addition to premature births associated with closely spaced pregnancies (within six months of a live birth): low birth weight and the placenta partially or completely peeling away from the inner wall of the uterus before delivery (placental abruption).[54]

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[52] Janet C. King, *The Risk of Maternal Nutritional Depletion and Poor Outcomes Increases in Early or Closely Spaced Pregnancies*, 133 THE JOURNAL OF NUTRITION 1732S–1736S (May, 2003) (citing studies).

[53] *See, e.g.*, U.S. DEP'T OF HEALTH & HUMAN SERVICES, MATERNAL AND CHILD HEALTH BUREAU, *Child Health USA 2013*, https://mchb.hrsa.gov/chusa13/perinatal-health-status-indicators/perinatal-health-status-indicators.html.

[54] Low birthweight babies are at an increased risk of lifelong health problems or even dying before age one. Jen Joynt, CALIFORNIA HEALTH CARE FOUNDATION, *Quality of Care: Maternal and*

Reduction of unintended pregnancy is a national public health goal, because, in addition to pre-term birth and low birth weight, the consequences include delayed prenatal care, and negative health effects for the children born of unplanned pregnancies.[55] In the U.S. and indeed, around the world, contraception use, especially contraception use that allows for birth spacing, also is associated with a reduction in maternal mortality.[56]

B. The Need for and California's Interest in Publicly Supported Contraception

According to the Guttmacher Institute, in 2014, 2,643,580 women in California were in need of publicly supported contraceptive services and supplies.[57] Women are considered to be in need of publicly supported

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Childbirth Health Metrics, CALIFORNIA HEALTH CARE FOUNDATION (Nov. 3, 2017), http://www.chcf.org/publications/2017/11/quality-maternity-care (last visited Feb. 23, 2018).

[55] GUTTMACHER INSTITUTE, *Unintended Pregnancy in the United States* (Sept. 2016), https://www.guttmacher.org/fact-sheet/unintended-pregnancy-united-states, (last visited Feb. 23, 2018)

[56] Amy O. Tsui et al., *Family Planning and the Burden of Unintended Pregnancies*, 32 EPIDEMIOLOGIC REVIEW 152, 165 (2010).

[57] GUTTMACHER INSTITUTE, *State Facts on Publicly Funded Family Planning Services: California* (Sept. 2016), https://www.guttmacher.org/fact-sheet/state-facts-publicly-funded-family-planning-services-california (last visited Feb. 23, 2018).

contraceptive services and supplies if they ever have had sex, are aged thirteen to forty-four, are able to become pregnant, are not pregnant or postpartum nor are they trying to become pregnant, and either have a family income below 250% of the federal poverty level or are younger than age twenty.[58] Large proportions of these women are young, people of color, low income, or uninsured.[59]

Most states use some of their own money (in addition to funds required to match federal grants) for family planning services. In 2010, California contributed $68.7 million to this effort.[60] According to the Guttmacher Institute, in 2014, publicly funded family planning centers in California helped avert 321,100 unintended pregnancies which, the Institute found, would have resulted in 156,100 unplanned births and 115,800 abortions.[61]

Further confirming California's interest in the challenged disclosure relating to public programs providing low cost or free contraceptive services, the Guttmacher Institute also found that by averting unintended pregnancies and other negative reproductive

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[58] *Id.*

[59] *Id.*

[60] GUTTMACHER INSTITUTE, *State Facts About Unintended Pregnancy: California* (Aug. 2017), https://www.guttmacher.org/fact-sheet/state-facts-about-unintended-pregnancy-california (last visited Feb. 23, 2018).

[61] *Id.*

health outcomes, publicly funded family planning services provided by safety-net health centers in California helped save the federal and state governments almost $1.8 billion in 2010.[62]

III. PETITIONERS' BRIEF DEMONSTRATES WHY CALIFORNIA HAS AN INTEREST IN REQUIRING THAT FACILITIES LIKE PETITIONER FALLBROOK PREGNANCY RESOURCE CENTER DISCLOSE THAT THEY ARE NOT LICENSED MEDICAL FACILITIES

The FACT Act furthers an additional state interest: that of ensuring that people in California seeking health care are not misled by the organizations to which they turn.[63] Petitioners' own brief demonstrates why such regulation is necessary.

Petitioners assert that Fallbrook Pregnancy Resources Center ("Fallbrook") is an "unlicensed center that offers non-medical pregnancy-related information and services for free" and cites to the Fallbrook website for a description of the services it provides.[64] Petitioners then argue that there is "no basis to conclude disclosure

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[62] *Id.*

[63] *Amici* do not here repeat the discussions in other briefs (*see, e.g.*, Brief for the State Respondents at 6–7) relating to the misleading or deceptive statements and actions of pregnancy centers that the FACT Act was intended to counter. Here they focus on a particular instance to further illustrate the problem the Act was intended to address.

[64] Pet. Br. at 6–7.

[like that required by the FACT Act] is needed to clarify anything at all because the centers are not purporting to provide medical services."[65] Significantly, however, even the most cursory review of the Fallbrook website demonstrates why California has an interest in requiring the challenged notice.

Citing to the Fallbrook webpage entitled "Our Services,"[66] Petitioners state that Fallbrook provides "pregnancy test kits that women administer and diagnose themselves, maternity clothing, baby clothes, baby food and formula, baby bottles, diapers, strollers, high chairs, baby toys, nursery furniture, play yards, educational programs, resources on maternal and prenatal health, emotional support, spiritual resources, preparation for parenting, and community referrals [that support a healthy pregnancy, parenting and early childhood care]."[67] Tellingly, however, the long description presented in the brief omits reference to ultrasounds. Yet, the very same webpage to which Petitioners cite also says: "Free ultrasound scan: If you are facing an unplanned pregnancy, a limited OB ultrasound will tell you if your pregnancy is viable and how far along you are. This information may determine

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[65] Pet. Br. at 27.

[66] FALLBROOK PREGNANCY RESOURCE CENTER, *Our Services*, http://www.fallbrookprc.com/Our-Services (last visited Feb. 23, 2018).

[67] Pet. Br. at 6–7; FALLBROOK PREGNANCY RESOURCE CENTER, *Our Services*, http://www.fallbrookprc.com/Our-Services (last visited Feb. 23, 2018).

what options are available to you. *If you have a positive pregnancy test our staff may schedule a limited OB ultrasound appointment for you.*"[68] [69] Equally significant, notwithstanding Petitioners' claim that because Fallbrook provides "pregnancy test kits that women administer and diagnose themselves"[70] no one could reasonably assume that Fallbrook offers medical services, no such statement appears on the webpage. Instead, the webpage states: "Free pregnancy tests: If you are experiencing any of [the] symptoms [described above] you should make an appointment at FPRC [Fallbrook Pregnancy Resource Center] to verify pregnancy. FPRC offers free pregnancy tests performed in a confidential setting. Our pregnancy tests are laboratory quality and up to 99% accurate...."[71]

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[68] Notably absent from the services description provided to a pregnant woman who accesses the website is any suggestion that Fallbrook staff will not perform that ultrasound. Yet, to make its case before this Court, Fallbrook alleges in the complaint that "Fallbrook contracts with a *separate* organization that is a licensed medical provider of ultrasound services. Fallbrook refers women to that provider's *separate* mobile facility located nearby." Complaint at 8 ¶ 40, *National Institute of Family & Life Advocates, dba NIFLA v. Harris* (emphasis added).

[69] FALLBROOK PREGNANCY RESOURCE CENTER, *Our Services*, http://www.fallbrookprc.com/Our-Services (last visited Feb. 23, 2018) (emphasis added).

[70] Pet. Br. at 6.

[71] FALLBROOK PREGNANCY RESOURCE CENTER, *Our Services*, http://www.fallbrookprc.com/Our-Services (last visited Feb. 23, 2018).

Fallbrook's homepage, where a pregnant woman is most likely to first encounter a description of its services, underscores the need for the disclosure mandated by the FACT Act for unlicensed facilities. After posing the questions "Pregnant?" "What's next?" the webpage provides a number of options including "CONFIRM YOUR PREGNANCY" (not, as implied by Petitioners, "confirm your pregnancy with a test kit that you will be required to administer yourself") and "FREE ULTRASOUNDS" (not, as implied by Petitioners, "we do not provide ultrasounds but we can refer you to a separate organization that can").[72]

Given that Fallbrook holds itself out as a facility to confirm a pregnancy based on "[its] pregnancy tests" and that it offers free ultrasounds that its "staff" will "schedule," California plainly has an interest in ensuring that the facility also informs women accessing its website and entering its premises that it is not a licensed medical facility.

CONCLUSION

California recognizes as fundamental rights the decisions to bear a child or obtain an abortion and to choose or refuse birth control. Because those rights are fundamental, California ensures that all people, including its low-income residents, can access those services, and thus exercise those rights. Pregnancy centers, which target low income women and adolescent

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[72] FALLBROOK PREGNANCY RESOURCE CENTER, www.fallbrookprc.com (last visited Feb. 23, 2018).

girls, but do not provide abortion services and do not dispense contraceptives, interfere with the exercise of those rights. The State of California therefore adopted the FACT Act to ensure that people who visited pregnancy centers received notice that California has public programs available at no or low cost that do permit them to exercise all of their reproductive rights and to ensure they know whether they are seeking pregnancy-related services from a facility that is not a licensed medical provider. California's interest in the FACT Act can withstand any level of constitutional scrutiny. Accordingly, *Amici* urge this Court to affirm the decision below.

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February 27, 2018